No. 15924

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK J. WALLEY, Executor of the Estate of Murrey London, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

MILTON DAVIS,
408 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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Statement Re Jurisdiction.

The United States of America filed an action of a civil nature in the United States District Court for the Southern District of California, Central Division, against appellant, as executor of the estate of Murrey London, for the recovery of various unemployment taxes provided for in the Internal Revenue Code [Tr. pp. 3-5; Complaint]. The taxes were owing by deceased as an employing unit and were assessed within the time allowed by law. It is provided in 28 U. S. C., Section 1340, and in Sections 7401-3 of the Internal Revenue Act of 1954, that the District Court shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, and it is provided in 26 U. S. C. Sec. 3744 that these taxes may be sued for and recovered

in the name of the United States before any District Court of the United States for the district within which the liability to such tax is incurred [Tr. pp. 3-5, Complaint].

Judgment was rendered in favor of the United States for the amount of the taxes alleged to be due, and appellant, defendant in the Court below, appeals from said judgment [Tr. p. 23, Judgment]. It is provided in 28 U. S. C., Section 1291, that the United States Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

Statement of the Case.

All of the facts are stipulated to and are contained in the Pre-Trial Conference Order and Supplemental Pre-Trial Conference Order, both of which were received in evidence; the facts are substantially as follows:

Between the dates of February 24 and July 22, 1948, certain unemployment taxes due to the United States of America from Murrey London for insurance contributions, unemployment and withholding taxes, imposed by Chapter 9, Sub-Chapters A, C and D of the Internal Revenue Code of 1939 (26 U. S. C. A. Chap. 9) were duly assessed against Murrey London as an employing unit. On March 1, 1948, Murrey London filed a voluntary petition in bankruptcy in the court below, being proceeding No. 45,752. A claim for the aforementioned taxes was filed by the United States against the bankrupt's estate for $5,759.04, the amount alleged to be then owing on the assessments for the taxes in question. The claim was allowed by the Bankruptcy Court without contest; no petition for disallowance of said claim was filed, and consequently, no hearings were had before the Referee in Bankruptcy respecting the allowance or disallowance of said claim, and

no order or decree was made by the Referee respecting such claim [Tr. p. 10, Pre-Trial Conference Order].

There was paid by the Trustee in Bankruptcy to the United States the sum of $243.29 in partial payment of the tax claim, and the balance is still unpaid.

On September 13, 1954, Murrey London died, and Appellant was duly appointed Executor of his Estate. On June 29, 1955, more than six years after the last assessment relative to the subject taxes was made the United States filed a claim for the unpaid portion thereof in the probate proceedings pending in the State Court. The claim was rejected by Appellant, as Executor, on the ground that the claim was rendered uncollectible by reason of lapse of time, more than six years having elapsed since the making of the assessments [Tr. p. 13, Supplemental Pre-Trial Conference Order].

On March 8, 1957, this action was filed by the United States against Appellant, as Executor of said Estate, and on July 23, 1957, the matter was submitted on stipulated facts to the court below for decision. On December 17, 1957, the Honorable William C. Mathes, Judge of the District Court of the United States for the Southern District of California, Central Division, rendered his judgment in favor of plaintiff, the United States of America, for the sum of $8,949.85, together with penalties and interest as prayed for in the complaint, and on December 30, 1957, judgment as rendered was filed and entered.

Defendant, Jack Jay Walley, as Executor of the Estate of Murrey London, being dissatisfied with said judgment, on February 11, 1958, served and filed his Notice of Appeal, and did on February 19, 1958, serve and file his Notice to the Clerk to prepare the Clerk's Transcript.

Questions Presented on Appeal.

It was agreed and stipulated between appellant and plaintiff, United States of America, that the period of limitations for the collection of the type of taxes involved herein is provided for in Section 3312 of the Internal Revenue Act of 1939, as amended, and that pursuant thereto such taxes are rendered uncollectible unless a proceeding in court for their collection shall be begun within six years of the assessment [Tr. p. 16, Stipulation].

It was conceded by the trial court that the tax assessments having been made in 1948, and the claim of the U. S. A. and this action to enforce payment thereof having been filed and commenced more than six years after the assessments, this suit is clearly barred by the Statute of Limitations unless the filing of the claim and its allowance in the bankrupt proceedings had the effect of converting the claim into a judgment against the bankrupt (District Court Memorandum of Decision).

The precise question, therefore, presented by this appeal, can be stated as follows:

> Does the filing of a proof of claim for taxes, in a bankruptcy proceeding, result in the claim being converted into a personal judgment against the bankrupt by the mere fact of its formal allowance without any contest or without any objections being filed thereto and without any subsequent hearing on the merits had thereon?

Specifications of Error.

1. The trial court erred in a matter of law in concluding that the allowance of the tax claim, filed in the bankruptcy proceedings, constituted a judgment against the bankrupt, for the collection of which there is no statute of limitations, without any finding or evidence that an order of allowance was made by the Court or Referee after a hearing upon the merits [Tr. p. 22, Conclusions of Law].

2. The trial court erred in a matter of law in concluding that the filing of the tax claim in the probate proceedings was timely because reduced to judgment within six years after assessment, without any finding or evidence that an order of allowance or other judgment was rendered against the deceased taxpayer in a proceedings for the collection of the tax brought within the six-year period [Tr. p. 23, Conclusions of Law].

3. The trial court erred in a matter of law in concluding that the doctrine of *"res judicata"* was applicable to the case at bar without any finding or evidence that prior to this action a judgment had been rendered or other order made by any competent court, adjudicating the liability of the deceased for the taxes in question, after a hearing on the merits or other determination of the issue of such liability [Tr. p. 23, Conclusions of Law].

4. The trial court erred in applying the principle that *"res judicata"* may be raised as a bar to the defense of the statute of limitations under the principle that it applies to matters which were not litigated but which could have been litigated, unless the trial court found or the evidence showed that there was some proceedings, prior to the filing of the tax claim, in which the matter of the liability of the bankrupt for such taxes was in fact litigated and adjudged.

SUMMARY OF ARGUMENTS.

I.

THE FILING OF A PROOF OF CLAIM FOR TAXES, IN A BANKRUPTCY PROCEEDING, DOES NOT RESULT IN THE CLAIM RISING TO THE DIGNITY OF A JUDGMENT AGAINST THE BANKRUPT BY THE MERE FACT OF ITS FORMAL ALLOWANCE AND WITHOUT ANY ORDER OR JUDGMENT MADE BY THE COURT OR REFEREE AFTER A HEARING ON THE MERITS THEREON.

A.

A Clear Distinction Exists Between the Effect of the Filing of a Claim in Bankruptcy Which Is Automatically Allowed Upon Its Filing, and the Effect of the Filing of a Claim Which Is Allowed After an Order Made by a Referee Following a Hearing on Its Merits After Objections Filed Thereto. In the Latter Instance the Order of the Referee Has the Effect of a Judgment of the District Court.

II.

THE DOCTRINE OF "RES JUDICATA" IS APPLICABLE WHERE THE IDENTICAL ISSUE WAS DECIDED IN A PRIOR CASE BY A FINAL JUDGMENT ON THE MERITS AND THE PARTY AGAINST WHOM THE PLEA IS ASSERTED WAS A PARTY OR IN PRIVITY WITH A PARTY TO THE PRIOR ADJUDICATION.

A.

The Principle That "Res Judicata" May Be Pleaded as a Bar, Not Only With Respect to Matters Actually Litigated but With Respect to Matters Which Could Have Been Litigated, Is of Course Also Applicable Only to Cases Where There Was Some Prior Litigation in Which Some Issues Were Adjudicated.

ARGUMENT.

I.

The Filing of a Proof of Claim for Taxes, in a Bankruptcy Proceeding, Does Not Result in the Claim Rising to the Dignity of a Personal Judgment Against the Bankrupt by the Mere Fact of Its Automatic Allowance and Without Any Order or Judgment Made by the Court or a Referee After a Hearing on the Merits Thereon.

A. A Clear Distinction Exists Between the Effect of the Filing of a Claim in Bankruptcy Which Is Automatically Allowed Upon Its Filing and the Effect of the Filing of a Claim Which Is Allowed After an Order Made by a Referee Following a Hearing on the Merits After Objections Filed Thereto. In the Latter Instance the Order of the Referee Has the Effect of a Judgment of the District Court.

In re McChesney (D. C. Cal., 1931), 59 F. 2d 340;

Goldstein v. Pearson (Mun. Ct. App., Dist. of Col., 1956), 121 A. 2d 260;

Massey & Felton Lumber Co. v. Benenson (D. C. N. Y., 1927), 23 F. 2d 107;

United States v. American Surety Co. (2nd Cir., 1932), 56 F. 2d 734;

United States v. Coast Wineries (9th Cir., 1942), 131 F. 2d 643;

Moses v. United States, 166 U. S. 507;

Wiswall v. Campbell (1896), 93 U. S. 347;

Maryman v. Dreyfuss (1915), 17 Ark. 17, 174 S. W. 549;

Lewith v. Irving Trust Co. (2nd Cir., 1933), 67 F. 2d 855;

In re Tinkoff (7th Cir., 1936), 85 F. 2d 305;

Donald v. Bankers Life Co. (5th Cir., 1939), 107 F. 2d 810.

The filing by the government of its claim in the bankruptcy proceedings was a "proceedings in court to collect" the taxes involved, but did not ripen into a judgment against the taxpayer so as to take the case out of the operation of the Statute of Limitations. The allowance of a claim for taxes, particularly where the allowance is not contested, constitutes merely "a proceeding in court to collect" the taxes, but does not result in a personal judgment against the bankrupt taxpayer. (*In re McChesney* (D. C., Cal., 1931), 59 F. 2d 340; *Goldstein v. Pearson* (Mun. Ct. App., Dist. of Col., 1956), 121 A. 2d 260.)

The filing of the claim is merely one of many "proceedings in court" which the government may commence, each one of which must be commenced within the six-year period of limitations, unless, the first of the proceedings so commenced results in a judgment being rendered against the taxpayer. (*In re McChesney, supra; Goldstein v. Pearson, supra.*)

A claim filed in bankruptcy proceedings is in the nature of a petition to share in a fund held by the court for distribution to creditors. (*Massey and Felton Lumber Company v. Benenson* (D. C. N. Y., 1927), 23 F. 2d 107.) The filing of the claim in bankruptcy is a proceeding *in rem, i.e.,* against the assets in the hands of the court, and is not a proceedings *in persona* against the bankrupt personally. (*In re McChesney, supra.*)

The precise point involved in the instant case was decided in the case of *In re McChesney, supra.* There the Collector of Internal Revenue filed a claim for taxes in the taxpayer's bankruptcy proceedings. The claim was allowed without contest since filed within the statutory period. The bankrupt received his discharge. Six years

thereafter the taxpayer filed a second proceeding in bankruptcy. The Collector filed a claim therein for the same taxes for which a claim was filed in the first bankruptcy proceeding.

Objections were filed to the allowance of the claim and the claim disallowed after a hearing by the Referee. The order of disallowance was affirmed by the court.

The Collector took the position that the allowance of the claim in the original bankruptcy proceeding resulted in a judgment against the taxpayer which thereafter permitted its collection without regard to any Statute of Limitations. In rejecting this contention, the court held, that the filing of the claim in bankruptcy and the subsequent allowance did not result in the claim becoming a judgment *in persona* against the bankrupt.

> "The filing of the claim, said the court, was a proceedings *in rem* against the assets in the hands of the court and was not a proceedings against the bankrupt personally."

The court further stated that the filing of the claim was a "proceeding in court" just as was the filing of the claim in the first bankruptcy proceeding, and that each of such proceeding must be brought within the statutory period, and, said the court, "the filing of the claim in the second bankruptcy having been filed beyond the statutory period was properly disallowed."

The precise point involved in this case was again raised and decided in *Goldstein v. Pearson, supra.* In that case, the taxpayer filed a proceedings in bankruptcy. The tax collector filed a claim for taxes which was allowed without contest. The bankrupt taxpayer received his discharge in bankruptcy.

After the statutory period for collection of the tax claim had run, the tax collector levied on wages of the bankrupt taxpayer, who paid the taxes under protest and brought this action for recovery.

Judgment in favor of defendant collector was reversed on appeal. The court based its reversal on the following reasoning:

> "We agree that the filing of the claim was a proceeding in court, but we do not agree that it automatically extended for an unlimited time the period for collection of taxes.
>
> "Assuming as the Collector claims, that the allowed claim in bankruptcy was in effect a judgment, it was a judgment only to the extent of the assets of the bankrupt (citing *in Re McChesney*). It was not a personal judgment against the bankrupt and no attachment or garnishment could issue upon it. The case would be quite different if within three years of the assessments the Collector had commenced an action for a personal judgment and after the three-year period had issued an attachment on the judgment.
>
> "In our opinion, the plain meaning of the Statute is that, no distraint or 'proceeding in court' for collection of the taxes should be begun after three years from the date of the assessment. The filing of the proof of claim in the bankruptcy proceeding was 'a proceeding in court,' but it, at least for the purposes of collection of the claim, completely terminated when the bankrupt was discharged and the case closed as a no asset estate. If the taxes were to be collected, it was necessary to commence some other court proceedings or to issue a distraint within a three-year period. This was not done."

The same question involved here was raised in *Massey and Felton v. Benenson, supra,* although the action did not involve a claim for taxes. In that case plaintiff filed a claim in bankruptcy proceedings filed by a corporate bankrupt, and the claim, after contest by the Trustee, was allowed for an amount less than originally filed for. Plaintiff then brought an action against the surety of the bankrupt principal contending that the allowance of the claim in bankruptcy against the bankrupt principal was equivalent to a judgment and established the indebtedness against the bankrupt principal. In that case the court said:

> "The interesting legal question about the facts is whether allowance of a claim in bankruptcy is equivalent to a judgment against the bankrupt."

In negativing this contention, the court stated that a claim in bankruptcy was in no sense a claim *in persona* against the bankrupt; the Trustee in Bankruptcy represents the creditors and not the bankrupt, and could not bind him to a personal judgment; the filing of a claim and its allowance is in the nature of a petition to share in funds held by the court for distribution to creditors.

In *Wiswall v. Campbell* (1896), 93 U. S. 347, it was held that a bankruptcy court had no jurisdiction to render a personal judgment against a bankrupt on a claim filed against the estate, and in *Maryman v. Dreyfuss* (1915), 17 Ark. 17, 174 S. W. 549, the same principal was enunciated by the court on the basis of the decision in *Wiswall v. Campbell, supra.*

The trial court in support of its contention that the allowance of a claim in bankruptcy is a judgment, relies upon

United States v. American Surety and *United States v. Coast Wineries.* These cases are distinguishable upon the facts.

There is a long line of cases beginning with *Moses v. United States,* 166 U. S. 507, included amongst which are the two cited cases, involving actions brought by the United States against the surety of a bankrupt principal. In those cases the taxpayer principal filed a petition in bankruptcy and in the bankruptcy proceedings the United States filed its claim for taxes. In each of those cases, *objections were filed* to the allowance of the government's claim, hearings were had and orders of allowance or disallowance made by the bankruptcy court, as the facts dictated. In the subsequent actions, brought by the United States against both the bankrupt principal and the surety company, the position was taken that the order allowing or disallowing the claim, as the case may be, was admissible in evidence to establish the indebtedness from the bankrupt principal.

It should be noted at the outset that in each of these cases, the claim of the government, filed in the bankruptcy proceedings, was contested and an order of court made following the contest.

In *United States v. Coast Wineries,* 131 F. 2d 643, in determining the effect of *the order made by the bankruptcy court in the hearing on objections** to the allowance of the government's claim for taxes, the court of appeals said as follows:

> "The jurisdiction of a bankruptcy court over the subject matter of taxes is specifically granted by the Bankruptcy Act, Section 64, which provides that the court shall order the Trustee to pay all taxes allegedly due and owing by the bankrupt to the United States.

> "This language necessarily implies *that in controverted matters** the court might judicially determine the amount of taxes due. This procedure was followed in this case. When the court held the *hearing to determine the taxes,** the attorney for the government was present. The record shows that the claim was before the court *on its merits** and that it was disallowed."

In *United States v. American Surety,* 56 F. 2d 734, a contrary position was taken than that taken by the court in *United States v. Coast Wineries,* and contrary to the position for which the case was cited by the trial court in the instant case. In that case it was held that the disallowance of the claim in bankruptcy *even though contested,** is not an adjudication binding upon the parties when the contested claim represents a non-provable debt as distinguished from a non-existent debt. In that case the Circuit Court said as follows:

> "But the distinction must be noted between the disallowance of a claim because a creditor had a non-provable debt and disallowance because he had no debt at all. Disallowance on the former ground decides nothing as to the merits of the claim."

It is apparent from the foregoing language and from the facts of these cases, that the allowance of a claim in bankruptcy, does not render the claim a personal judgment against the bankrupt, unless (1) the Order allowing or disallowing the claim has been made in a controverted matter, and (2) that in the controversy it appears that the contest was one involving the existence or nonexistence of the indebtedness in order that the contest be one determining the claim on its merits.

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*Emphasis supplied.

The provisions of the Bankruptcy Act itself also indicates that the allowance of a claim in bankruptcy, without a contest, is not an adjudication of the existence of the claim as between the claimant and the bankrupt.

Section 57 of the Bankruptcy Act of 1939, as amended, relating to proof and allowance of creditors' claims, provides in part as follows:

> "(a) A proof of claim shall consist of a statement under oath in writing . . . and shall be filed in the court of bankruptcy or before the Referee;
>
> "(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest . . .;
>
> "(k) Claims which have been allowed may be reconsidered for cause and allowed or rejected in whole or in part, and dividends approved upon claims which, though allowed, have been reconsidered and rejected, may be recovered by the Trustee from the creditor who received it."

It appears from the foregoing provisions of the Act, that a claim in bankruptcy is automatically allowed upon the filing of the proof of claim with the Court or Referee, and that in the absence of a contest respecting its allowance, no order, or decree or judgment is made by the bankruptcy court which could constitute *a judgment against the bankrupt.*

One of the decisions of the Appellate Courts of the United States points up the distinction between the effect of a claim, filed in a bankruptcy proceeding, which is automatically allowed upon being filed with the Court, and the effect of a claim which is allowed by an order

of a referee after a hearing based upon objections to its allowance.

In *Lewith v. Irving Trust Co., supra,* plaintiff creditor filed a claim for rental due from the bankrupt. The claim was allowed. Thereafter, the trustee filed objections to its allowance. The objections came on to be heard before the referee following which the referee made an order allowing the claim. Thereafter, the creditor sought to amend his claim from a general one to a preferred one. The referee made his order allowing the claim to be amended. The District Court reversed the order of the referee and the creditor appeals.

In affirming the order of reversal made by the District Court, the Court of Appeals points out that the Bankruptcy Act empowers the District Court to reconsider for cause claims allowed. With respect to the effect of the order of allowance, the Appellate Court says:

> "So far as concerns the formal allowance of the claim by mere filing, the equities of the case may require nothing more than that the creditor wishes to amend and is not estopped. * * * But allowance *after objection** is another matter; there has been a litigation upon issues settled by the decision of the Court. Such an allowance has the substantial element of a judgment and has the effect of a judgment * * *."

It is obvious from the decision in the foregoing case that the mere formal allowance by the Court, based upon the mere filing of the proof of claim, does not convert the claim into a judgment or give the claim the effect of a judgment. It is the order of the referee, after a hearing

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*Emphasis added.

on the merits, and in the absence of review by the Court, which raises the claim to the dignity of a judgment.

To the same effect is the decision in *Stearns Salt and Lumber Co. v. Hammond, supra,* in which case two claims were filed by a creditor and allowed. Objections were filed on the ground of alleged preferences. After a hearing on the issues made out by the objections, the referee made an order of allowance. It is with respect to this order that the Court of Appeals said;

> "It is well settled that an action of a referee in bankruptcy in allowing or disallowing a claim is a judgment, final in the absence of review."

The trial court, in its Memorandum of Decision, states that the rule is well settled that the action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of review, citing numerous cases. In the light of the facts of those cases, the principal might be better stated as follows; the acts of a referee allowing or disallowing a claim after a hearing on its merits, following objections filed thereto and a consideration of the issues raised thereby, is a judgment, final in the absence of review.

The distinction between the two kinds of allowances is again made apparent after a consideration of the facts in the cases of *In re Tinkoff, supra,* and *Donald v. Bankers Life Co., supra.* In those cases matters were referred to the referee for hearings and litigation following which the referee made his order. It is with reference to these orders, made after hearing and the taking of evidence, that the Court of Appeals said;

> "Under the Act (11 U. S. C. Sec. 1) a referee is a quasi-judicial officer who gives judgment or final order upon matters properly submitted to him, sub-

ject to review by the District Court * * *. *Adjudications* of the referee, if not reviewed * * * have the force and effect of judgments and orders of the District Court."

There is not one case, relied upon by the trial court in support of its judgment, or cited by the plaintiff, United States of America, in which the Court of Appeals did not hold that it is an order of the referee, *made after a hearing on the merits,* after objections or other attack, which, in the absence of review, has the effect of a judgment or order of the District Court.

II.

The Doctrine of "Res Judicata" Is Applicable Only Where the Identical Issue Was Decided in a Prior Case by a Final Judgment on the Merits and the Party Against Whom the Plea Is Asserted Was a Party or in Privity With a Party to the Prior Adjudication.

A. The Principle That "Res Judicata" May Be Pleaded as a Bar Not Only With Respect to Matters Actually Litigated but With Respect to Matters Which Could Have Been Litigated, Is, of Course, Also Applicable Only to Cases Where There Was Some Prior Litigation in Which Some Issues Were Adjudicated.

French v. Rishell (1953), 40 Cal. 2d 477, 254 P. 2d 26;

Owl Drug Co. v. Bryant (1953), 115 Cal. App. 2d 296, 252 P. 2d 69;

Tuolumne Gold Corp. v. Johnson, 61 Fed. Supp. 62;

Lewith v. Irving Trust Co., supra;

Stearns Salt & Lumber Co. v. Hammond (6th Cir. 1914), 217 Fed. 559;

In re Henry Holzapfel's Sons, Inc. (7th Cir. 1957), 249 F. 2d 861;

Chicot County Drainage District v. Baxter State Bank (1940), 308 U. S. 371;

Cromwell v. County of Sac (1876), 94 U. S. 351;

Fishgold v. Sullivan Drydock & Repair Corp. (1946), 328 U. S. 275.

The doctrine of *"res judicata"* is applicable where identical issues were decided in a prior case *by a final judgment on the merits* and the party against whom the plea is asserted was a party or in privity with a party prior to adjudication. (*Owl Drug Co. v. Bryant, supra.*) The same principle was enunciated by the Supreme Court of the State of California in *French v. Rishell, supra.*

The same definition of the doctrine of *"res judicata"* is contained in numerous decisions of the Federal Appellate Courts. In the matter of *In re Henry Holzapfel's Sons, Inc., supra,* the United States of America filed a claim for taxes in a bankruptcy proceeding. The trustee filed a petition for disallowance. The issues were heard by the referee who ruled against the trustee. On review, the District Court affirmed the referee's order. The trustee then filed a plenary suit to recover a refund of the taxes. The Court of Appeals held that the order of the referee, as affirmed by the District Court, was *"res judicata"* of the plenary suit; same subject matter, same parties, same issues.

In *Cromwell v. County of Sac, supra,* in considering the applicability of the doctrine of *"res judicata"*, the Supreme Court said:

> "The rule is that where the claim upon which the judgment was rendered is the same claim as that sued upon in the later action, *the judgment in the*

*former action, if rendered on the merits,** constitutes an absolute bar to the maintaining of a subsequent action."

And in *Fishgold v. Sullivan Drydock & Repair Corp., supra,* the Supreme Court reaffirms the rule laid down in the *Cromwell* case as being the rule in those cases where the decision in the prior case was one based upon the merits.

In order to make applicable the doctrine of *"res judicata"* to the instant case, it must appear that prior to the filing of the claim in the probate proceeding in the State Court, the validity of the claim was once litigated upon its merits and an adjudication made thereon in some prior proceedings. The only prior proceedings involving the claim for taxes was the bankruptcy proceedings of the taxpayer London in which the same tax claims were filed and allowed. However, the evidence clearly demonstrates that the validity of the tax claim was not adjudicated on the merits, no objections or petition for disallowance having been filed, and in the absence of such evidence, the doctrine of *"res judicata"* is not applicable.

In *Lewith v. Irving Trust Co., supra,* it was held that where an order of allowance is made by a referee, after objection is filed thereon, there has been a litigation upon the issues which was settled by decision of the Court and that the judgment following such litigation is *"res judicata"* between the same parties.

It would appear from the cases cited and numerous others on the same point, that the mere filing of a claim for taxes does not raise any issues as to its validity. It

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*Emphasis supplied.

is the filing of objections to the claim or the filing of a petition for disallowance thereof which gives rise to issues which are to be adjudicated by the referee. It is these issues which must be examined to determine whether they are the same issues sought to be adjudicated by the same parties in a subsequent proceeding, and it is the consideration of these matters that makes applicable, in a proper case, the bar of *"res judicata"*.

Since there was no evidence in the instant case to support a finding that there was a hearing on the merits relating to the validity of the tax claim, the trial court took the position that since the bankrupt taxpayer could have litigated the validity of the tax claim, in fact had the duty to do so, the doctrine of *"res judicata"* could be applied as a bar to the present proceedings. The basis for the application of the doctrine, said the trial court, is the well settled principal that the doctrine applies equally

> "not only as respects matters *actually presented* to sustain or defeat the right asserted *in the earlier proceedings,* but also as respects matters which might have been presented to that end." (Italics supplied.)

An examination of the language in the foregoing principle clearly demonstrates the lack of merit in the position. The language indicates that before *"res judicata"* may be raised, "as to matters which might have been presented," there must have been a hearing in which "some matters were actually presented." An adjudication of some matters in a prior proceeding is a prerequisite to the application of the principle.

Neither the right in the bankrupt to be heard nor the duty on the bankrupt's part to question the validity of the tax claim, can be substituted for the requirement of an

actual prior hearing, on the issues, of the validity of the tax claim to making applicable the principle to which the trial court made reference.

The opinion in *Chicot County Drainage District v. Baxter State Bank,* points up the necessity *of a prior hearing* before "matters which could have been litigated" can be held to be subject to the bar of *"res judicata"*. In that case the Appellate Court refers to the well settled principle that *"res judicata"* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any "available matter which might have been presented to that end," *since there had been a prior adjudication on the merits.*

In *Tuolumne Gold Corp. v. Johnson,* 61 Fed. Supp. 62, the United States District Court held that,

> "under California Law a former judgment is *'res judicata'* only as to that which appears on its face to have been adjudicated or which was actually and necessarily included therein, and when it affirmatively appears that an issue *was not determined by a judgment,* such judgment is not *'res judicata'* on that issue. Citing Sec. 1911, Civil Code, State of California."

It seems obvious that the doctrine of *"res judicata"* applied by the trial court to bar the attack upon the validity of the tax claims in this action, can only be applied *if the formal allowance,* of the claim for taxes in the bankruptcy court, constituted a judgment against the bankrupt. If the latter proposition be true, then there is no need to apply the doctrine of *"res judicata"* appellant having conceded that if a judgment had been rendered in

the bankruptcy proceeding against the bankrupt, the defense of the statute of limitations would not be well taken. It would appear that the trial court applied the doctrine because there is considerable question as to whether the formal allowance, without a hearing on the merits, constituted a judgment against the bankrupt.

Conclusion.

In conclusion, appellant submits that since the evidence shows that there was no order of the referee in bankruptcy or of the District Court following a hearing on the merits of the claim for taxes filed by the United States of America, in the bankruptcy proceedings, the trial court erred in concluding that a personal judgment had been rendered in the bankruptcy proceeding against the deceased Murrey London, and therefore, the tax claim, filed in the probate proceedings was rendered uncollectible by lapse of time. Appellant respectfully urges that the judgment of the trial court be reversed with directions that judgment be rendered in favor of appellant, defendant in the court below.

Respectfully submitted,

Milton Davis,

Attorney for Appellant.